88-124

Case No. ——

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1988

LYNN L. BREININGER
PETITIONER

v.

SHEET METAL WORKERS
INTERNATIONAL ASSOCIATION
LOCAL UNION NO. 6
RESPONDENT

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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## I. QUESTIONS PRESENTED BY PETITION FOR WRIT OF CERTIORARI:

A. Whether a union member's claim that his union breached its duty of fair representation by engaging in discriminatory job referrals may be brought in Federal District Court in an action invoking the court's jurisdiction under 28 U.S.C. Section 1337?

B. Whether a union member who claims that his union breached its duty of fair representation by engaging in discriminatory job referrals may maintain an action against his union in Federal District Court notwithstanding the absence of an affirmative allegation that an employer breached a collective bargaining agreement?

C. Whether a union's discriminatory refusal to refer its member to jobs constitutes "discipline" within the meaning of the Labor Management Reporting and Disclosure Act?

## PARTIES TO PROCEEDINGS BELOW

Lynn L. Breininger, plaintiff-appellant below and petitioner herein was a member of Sheet Metal Workers International Association Local Union No. 6 since he entered its apprenticeship program in 1949.

Sheet Metal Workers International Association Local Union No. 6 is a labor organization representing journeymen and apprentice sheet metal workers and a party to a multi-employer collective bargaining agreement covering the Toledo, Ohio area and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan.



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## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Lynn L. Breininger, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for Sixth Circuit entered in this matter on March 1, 1988. On April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied Petitioner's Petition for Rehearing which had been timely filed on March 15, 1988.

## OPINIONS BELOW

The March 1, 1988 opinion of the United States Court of Appeals for the Sixth Circuit, whose judgment herein is sought to be reviewed was originally not recommended for publication in accordance with its Local Rules. On June 15, 1988, the United States Court of Appeals for the Sixth Circuit granted a motion for publication of its March 1, 1988 decision. The decision has not been reported to date and is represented in the Separate Appendix to this petition at Appendix A, pp. A1 to A3. Publication is pending. The prior opinion of the United States District Court for the Northern District of Ohio, Western Division, also reprinted in the Appendix B at pp. A4 to A11 is an unreported decision.

## STATEMENT OF JURISDICTIONAL GROUNDS

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on March 1, 1988. On March 15, 1988, petitioner filed a timely petition for rehearing before the United States Court of Appeals for the Sixth Circuit. In its Order filed on April 22, 1988 the United States Court of Appeals for the Sixth Circuit denied petitioner's petition for rehearing. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

—o—

## STATUTORY PROVISIONS INVOLVED

The statutes involved are set forth in Appendix E at pp. A13 to A15.

—o—

## STATEMENT OF THE CASE

This Petition challenges the judgment of the United States Court of Appeals for the Sixth Circuit which affirmed a dismissal by the United States District Court for the Northern District of Ohio of petitioner's First Amended Complaint which alleged (1) that the Sheet Metal Workers International Association Local Union No. 6 (hereinafter "Local 6") breached its duty of fair representation by engaging in discriminatory job referrals and (2) that the said Local 6 failed to refer Petitioner to jobs because of his previous support of unsuccessful candidates for business manager and business agent, as part of



said local's widespread, improper "discipline" for political opposition in violation of 29 U.S.C. Section 411(5), 29 U.S.C. Section 412, and 29 U.S.C. Section 529. See First Amended Complaint, Appendix F at A16.

The applicable collective bargaining agreement, which covered all sheet metal workers under the jurisdiction of Local 6, provided that the Union was to furnish upon request duly qualified journeymen and apprentice sheet metal workers and that employers were to confirm, in writing, to Local No. 6 when requesting employees.

Petitioner alleged that on one occasion, when a contractor from outside of the Local 6 jurisdiction requested him by name in writing, the Union refused to send him and sent out two other men. Petitioner also alleged that two men were referred out of sequence of the union's job referal list to his detriment. One of these persons was a member of the "Concerned Brothers", a political group that backed the administration of the business manager and business agent then in office.

Petitioner also alleged and testified in his deposition to widespread discrimination in referrals made to lucrative jobs at Bechtel Power Company's Fermi job site. These referrals went primarily to members of the "Concerned Brothers" political group. No written job requests from Bechtel Power Company to the Local 6 were available in discovery.

Petitioner testified in his deposition that he had filed charges with the International Union and that he had contacted the National Labor Relations Board only to be informed that the instant matter was a contract dispute and that the NLRB did not handle that sort of claim.

In its Opinion and Order filed on February 20, 1987, the United States District Court for the Northern District of Ohio, Western Division, per Judge Nicholas J. Walinski, granted a Motion made by Local 6 for Summary Judgment and dismissed Petitioner's First Amended Complaint on the ground that both the claim for breach of duty of fair representation and the claim for alleged illegal discipline in violation of the Labor Management Reporting and Disclosure Act of 1959, as amended, 29 U.S.C. Sections 411, 412 and 529 were pre-empted by the National Labor Relations Board's exclusive jurisdiction (Appendix B at pp. A4 to A11). On appeal by Petitioner herein, the United States Court of Appeals for the Sixth Circuit in its decision filed March 1, 1988 affirmed the February 20, 1987 Opinion and Order of the District Court holding that Petitioner's claim for breach of duty of fair representation was pre-empted by the National Labor Relations Board's exclusive jurisdiction over allegedly discriminatory referral policies and that alleged discrimination in Local 6's referral system did not breach the employee's union membership rights and did not constitute "discipline" within the meaning of the Labor Management Reporting and Disclosure Act (Appendix A at pp. A1 to A3). On April 22, 1988, the United States Court of Appeals for the Sixth Circuit denied, without any opinion, Petitioner's Petition for Rehearing (Appendix D at p. A12).

In the within case, Petitioner had invoked the jurisdiction of the United States District Court for the Northern District of Ohio, Western Division pursuant to 28 U.S.C. Sections 1331, 1337, 1343(4) and 28 U.S.C. Sections 2201 and 2202. As to the First Count of his First Amended Complaint, Petitioner further alleged that his suit was



brought pursuant to 29 U.S.C. Sections 151, 158(b) and 159, based on allegations of the breach of duty of fair representation. As to the Second Count of his First Amended Complaint, Petitioner further invoked the District Court's jurisdiction pursuant to 29 U.S.C. Sections 411, 412, and 529, known as the Labor Management Reporting and Disclosure Act, as amended.

## REASONS FOR GRANTING THE WRIT

Petitioner, Lynn L. Breininger, respectfully submits that the United States Court of Appeals for the Sixth Circuit has erroneously decided that a union member who has alleged that his union breached its duty of fair representation by failing to refer him to jobs must bring that claim before the National Labor Relations Board. In so ruling, the Sixth Circuit has divested union members of their rights to invoke the Federal Court's jurisdiction in order to supervise union conduct. In the within case, Petitioner alleged in his First Amended Complaint that the respondent's course of conduct was arbitrary, discriminatory and in bad faith without reason or cause. The Sixth Circuit, in holding that the District Court lacked jurisdiction, cited *Local 100; Journeymen v. Borden,* 373 U.S. 690, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963) for the proposition that the NLRB has exclusive jurisdiction over claims of discrimination in job referrals. It is respectfully submitted that in *Borden, supra,* this Court dealt only with the issue of NLRB pre-emption over State Court Claims.

Moreover, *Borden* was decided prior to two decisions of this Court acknowledging a "duty of fair representa-

tion" exception to NLRB pre-emption. See *Vaca v. Sipes*, 386 U.S. 171 (1967); *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971).

In *Amalgamated Association of Sheet, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971), this Court explained that actions seeking damages for a breach of a union's duty of fair representation exist concurrently with the National Labor Relations Board remedies. This Court explained at 403 U.S. at 301:

> . . . this Court's refusal to limit judicial competence to rectify a breach of the duty of fair representation rests upon our judgment that such actions cannot, in the vast majority of situations where they occur, give rise to actual conflict with the operative realities of federal labor policy. The duty of fair representation was judicially evolved, without the participation of the NLRB, to enforce fully the important principal that no individual union member may suffer invidious, hostile treatment at the hands of the majority of his co-workers. Where such union conduct is proved it is clear, beyond doubt, that the conduct could not otherwise be regulated by the substantive federal law . . .

In the within case, Petitioner alleged in his First Amended Complaint that "in refusing to honor employer requests for plaintiff's employment, in refusing to properly administer the job seniority list, and in refusing to process and/or acknowledge his charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorly, and/or in bad faith and/or without reason or cause." See First Amended Complaint, Appendix F at p. A20). It is submitted that this



Court's two previous opinions in *Vaca v. Sipes*, 386 U.S. 171 (1967) and in *Amalgamated Association of Sheet, Electric Railway and Motor Coach Employees of America v. Lockridge*, 403 U.S. 274 (1971) sought to prevent the exact result sanctioned by the United States Court of Appeals for the Sixth Circuit in the within case.

In *Vaca v. Sipes*, 386 U.S. 171 (1967), this Court noted that a primary justification for the pre-emption doctrine—the need to avoid conflicting rules of substantive law in the labor relations area and the durability of leaving the development of such rules to the administrative agency created by Congress for that purpose—is not applicable to cases involving breaches of the union's duty of fair representation. The statutory duty of fair representation was developed over forty years ago in a series of cases involving alleged racial discrimination by unions certified as exclusive bargaining representatives under the Railway Labor Act. *Steele v. Louisville and N.R. Co.*, 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944). The duty of fair representation was soon thereafter extended to unions certified under the National Labor Relations Act. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953). The duty of fair representation remained judically cognizable long after the NLRB was given unfair labor practice jurisdiction over union activities by the LMRA. Moreover, when the Board decided that a union's breach of its duty of fair representation would henceforth be treated as an unfair labor practice, the Board adopted and applied the doctrine as it had been developed by the federal courts. See *Vaca v. Sipes*, 386 U.S. 171 at 181.

As this Court noted in *Vaca v. Sipes,* the collective bargaining system as encouraged by Congress and administered by the NLRB of necessity subordinates the interest of an individual employee to the collective interests of all employees in the bargaining unit. *Vaca v. Sipes,* 386 U.S. 171 at 182. This Court explained the implications of a pre-emption rule of individual union member's rights in *Vaca v. Sipes,* 386 U.S. 171 at 182 as follows:

> . . . This Court recognized in *Steele* that the congressional grant of power to a union to act as exclusive bargaining representative, with its corresponding reduction in the individual rights of the employees so represented, would raise grave constitutional problems if unions were free to exercise this power to further racial discrimination. 323 U.S., at 198-199. Since that landmark decision, the duty of fair representation has stood as a bulwark to prevent arbitrary union conduct against individuals stripped of traditional forms of redress by the provisions of federal labor law. Were we to hold, as petitioners and the government urge, that the courts are foreclosed by the NLRB's *Miranda Fuel* decision from this traditional supervisory jurisdiction, the individual employee injured by arbitrary or discriminatory union conduct could no longer be assured of impartial review of his complaint, since the Board's General Counsel has unreviewable discretion to refuse to institute an unfair labor practice complaint.

Thus, even if the Board were unwilling or unable to remedy even a small group of cases involving a union's breach of duty of fair representation, the Board's inaction would frustrate the basic purposes underlying the duty of fair representation.

It is respectfully submitted that the Sixth Circuit's decision in the within case conflicts with the aforementioned prior holdings of this Court.



Moreover, the Sixth Circuit decided the within case in conflict with its own previous holding and in conflict with case law enunciated in other circuits. In *Amalgamated Association of Street, Electric Railway and Motor Coach Employees of America v. Lockridge,* 403 U.S. 274 (1971), this Court noted at 403 U.S. at 299:

> . . . Indeed, in *Vaca v. Sipes,* 386 U.S. 171 (1967), we held that an action seeking damages for injury inflicted by a breach of a union's duty of fair representation was judicially cognizable in any event, that is, even if the conduct complained of was arguably protected or prohibited by the National Labor Relations Act and whether or not the lawsuit was bottomed on a collective bargaining agreement.

In *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir.1974), a case like the present one involving job referrals, the Fifth Circuit noted at 500 F.2d at 748:

> Every Circuit which has faced the question has concluded that the federal courts have subject matter jurisdiction over a bare DFR claim under 28 U.S.C. Section 1337, which authorizes federal suits arising under any act of Congress regulating commerce. The National Labor Relations Act is an "Act of Congress regulating commerce." See Capital Service vs. NLRB, 1954, 347 U.S. 501, 504, 74 S.Ct. 699, 702, 98 L.Ed. 887. A suit for breach of a duty of fair representation is one "arising under" the National Labor Relations Act within the meaning of Section 1337 by virtue of Section 9(a)'s dual creations of exclusive power in the bargaining agent to represent all employees in the unit and the correlative obligation to represent those employees fairly in dealings with the employer.

See *Nedd v. United Mine Workers of America,* 400 F.2d 103 (3rd Cir.1968); *Retana v. Apartment, Motel, Hotel*

*and Elevator Operators Union, Local No. 14,* 453 F.2d 1018 (9th Cir.1972); *De Arroyo v. Sindicate de Trabajadores Packing House,* 425 F.2d 281 (1st Cir.1970); *Cunningham v. Erie Railroad Co.,* 266 F.2d 411 (2d Cir.1959); *Brady v. Trans World Airlines, Inc.,* 401 F.2d 87 (3rd Cir.1968).

The internal conflict of the Sixth Circuit is highlighted by reviewing *Storey v. Local 327, International Brotherhood of Teamsters,* 759 F.2d 517 (6th Cir.1985), wherein the Sixth Circuit held that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of federal district courts even where there is no accompanying claim under Section 301 for breach of contract. In *Storey, supra,* the Sixth Circuit adopted this jurisdictional view of this issue and specifically embraced the Fifth Circuit view enunciated in *Smith v. Local 25, Sheet Metal Workers International Association,* 500 F.2d 741 (5th Cir.1974). In *Storey, supra,* the Sixth Circuit opined at 725 F.2d at 523:

> . . . The duty of fair representation does not arise out of a collective bargaining agreement; it flows from the union's statutory position as exclusive representative and exists both before and after the execution of an agreement.
>
> In a case similar to the present one in many respects, the Fifth Circuit has held in Smith v. Local 25, Sheet Metal Workers International Association, 500 F.2d 741, 748 (5th Cir.1974), that claims for breach of a union's duty of fair representation are within the Section 1337 jurisdiction of federal district courts even when there is no accompanying claim under Section 301 for breach of contract. We adopt the view of the jurisdictional issue as developed by the Fifth Circuit and several other courts of appeals . . .



By stark contrast, without mentioning its prior holding, the Sixth Circuit states as follows at p. 2 of its March 1, 1988 decision:

> Moreover, if the employee fails to affirmatively allege that his employer breached the collective bargaining agreement, which appellant has failed to do in the case at bar, he cannot prevail . . .

In *Lewis v. Local Union No. 100 of Laborers International Union of North America,* 750 F.2d 1368 (7th Cir.1984), a case involving job referral discrimination, the Seventh Circuit held that under *Vaca v. Sipes,* the federal courts retain concurrent jurisdiction with the NLRB over all fair representation claims regardless of the presence of the employer as a defendant in the lawsuit.

It is respectfully submitted that in the within case the Sixth Circuit has unwarrantedly intruded upon the rights of individual union members to redress invidious, arbitrary and hostile union activity. The Sixth Circuit has gone off on a direction of its own, ignoring its own previous authority, that of other circuits and most importantly, that of this Court. If the Sixth Circuit's opinion is permitted to stand unchallenged, organized labor will be permitted to engage in gross patterns of discrimination in job referrals without facing the threat of a member's lawsuit to restrain its conduct. The rights of individual union members will suffer.

It is respectfully submitted that the Sixth Circuit's opinion is in conflict in this respect with other circuits and with its own previous decision. Thus, supervision of this Court is necessary in order to promote uniformity and to clarify the conflict in the Circuits.

In dealing with the Second Count of Petitioner's First Amended Complaint, the Sixth Circuit has decided that Petitioner's claims did not constitute "discipline" under 29 U.S.C. 411(a)(5). It is respectfully submitted that in the within case, Petitioner was not a union officer but a long time member who was not referred for employment by his union because of his prior political opposition to the "Concerned Brothers". The Sixth Circuit failed to mention its previous holding in *Murphy v. International Union of Operating Engineers, Local 18,* 794 F.2d 114 (6th Cir.1985), wherein it held that a union's action in foreclosing a member's participation in a work referral program was an action which set him apart from other members in good standing. The Sixth Circuit in *Murphy, supra,* noted that such a sanction unquestionably affected the member's membership rights. This Court then should resolve the conflicting approach taken by the Sixth Circuit in order to ensure uniformity of results.

## CONCLUSION

For the reasons set forth above, petitioner, Lynn L. Breininger, respectfully prays that a writ of certiorari be granted.

Respectfully submitted,

WASSERMAN, BRYAN, LANDRY & HONOLD

Francis J. Landry
Attorney for Petitioner,
Lynn L. Breininger

# APPENDIX

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**APPENDIX A**

RECOMMENDED FOR PUBLICATION

NO. 87-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| LYNN L. BREININGER, | ) | |
| | ) | ON APPEAL |
| Plaintiff-Appellant, | ) | FROM THE |
| | ) | UNITED STATES |
| V. | ) | DISTRICT COURT |
| | ) | FOR THE |
| SHEET METAL WORKERS | ) | NORTHERN |
| INT'L ASSOC., LOCAL UNION | ) | DISTRICT |
| NO. 6, | ) | OF OHIO |
| | ) | |
| Defendant-Appellee. | ) | |

Decided and filed March 1, 1988

BEFORE: ENGEL, KENNEDY and KRUPANSKY, Circuit Judges.

PER CURIAM. The instant action arises from plaintiff-appellant Lynn L. Breininger's allegation that appellee, the Sheet Metal Workers International Association Local Union No. 6 ("the Union") failed to refer Breininger for employment through the union hiring hall. Breininger has asserted that this failure to refer amounted to 1) a breach of the Union's duty of fair representation, and 2) retaliation for political opposition and a violation Sections 101, 102, and 609 of the Union Member's Bill of Rights of the Labor-Management Reporting and Disclosure Act of 1959 (the "LMRDA"). The lower court granted the Union's motion for summary judgment, deciding that the case was committed to the exclusive jurisdiction of the National

Labor Relations Board (NLRB). From this decision, Breininger appealed.

It is well-settled that union discrimination in job referrals is a matter within the exclusive jurisdiction of the NLRB. *See Local 100, Journeymen v. Borden*, 373 U.S. 690, 695-696, 83 S.Ct. 1423, 10 L.Ed.2d 638 (1963); *Int'l Brotherhood of Boilermakers v. Hardeman*, 401 U.S. 233, 239, 91 S.Ct. 609, 28 L.Ed.2d 10 (1971); *Turner v. Local Lodge No. 455*, 755 F.2d 866 (11th Cir. 1985).

It is of no consequence that the union's allegedly discriminatory referral policies are described as a breach of the NLRA's duty of fair representation or as a violation of the LMRDA's bill of rights. "It is not the label affixed to the cause of action . . . that controls the determination." *Borden*, 373 U.S. at 698. The case law developed subsequent to *Borden* and *Hardeman* forecloses either theory.

Circuit courts have consistently held that NLRA fair representation claims must be brought before the Board. *Journeymen Pipe Fitters Local 392 v. NLRB*, 712 F.2d 225, 228 (6th Cir. 1983); *Laborers Health & Welfare Trust for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 779 F.2d 497 (9th Cir. 1985), *cert. granted*, 107 S.Ct. 1283 (1987). Moreover, if the employee fails to affirmatively allege that his *employer* breached the collective bargaining agreement, which appellant failed to do in the case at bar, he cannot prevail. *Bagsby v. Lewis Brothers, Inc. of Tennessee*, 820 F.2d 799, 801 (6th Cir. 1987) (plaintiff must prove that the employer breached the collective bargaining agreement *and* that the union breached its duty of fair representation or plaintiff cannot succeed against either the union or the employee).



Appellant's LMRDA claim is equally without merit. This claim must fail because appellant did not demonstrate that he was improperly "disciplined," a crucial element to a LMRDA claim.

The term "discipline" was "meant to refer only to punitive actions diminishing *membership* rights." *Finnegan v. Leu*, 456 U.S. 431, 438, 102 S.Ct. 1867, 72 L.Ed.2d 239. The LMRDA's bill of rights is intended to secure the rights of members in their status as union members and does not secure other rights related to a member's employment. *Id.* at 436-438. Hiring hall referrals are not a function of union membership since referrals are available to non-members as well as to members. *See Turner v. Local Lodge # 455*, 755 F.2d at 869. Discrimination in the referral system, because it does not breach the employee's union membership rights, does not constitute "discipline" within the meaning of LMRDA. *See Turner*, 755 F.2d at 866 (excluding an employee from job referrals does not undermine the union member's status as a member of the union, and, hence, does not violate LMRDA); *Hackenburg v. Int'l Brotherhood of Boilermakers*, 694 F.2d 1237 (10th Cir. 1982) (discrimination in hiring hall referrals does not implicate LMRDA or duty of fair representation).

The decision of the district court to enter summary judgment in the instant case is, therefore, AFFIRMED.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| LYNN L. BREININGER, Plaintiff, | ) | |
| vs. | ) | Case No. C 83-1126 OPINION and ORDER |
| SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, Defendants. | ) | |

• • •

(Filed February 20, 1987)

WALINSKI, J.

This cause is before the Court on defendant Sheet Metal Workers International Association Local Union No. 6's ("Union") motion for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure. In addition or in the alternative, defendant requests the Court to strike plaintiff's jury demand. Also before the Court is plaintiff's memorandum in opposition with exhibits. Plaintiff's amended complaint alleges a cause of action based on a breach of the duty of fair representation under the Labor Management Relations Act of 1947, as amended, 29 U.S.C. §§ 151, 158(b), and 159 ("LMRA") and alleges a violation of the Labor-Management Reporting and Disclosure Act of 1959, as amended, 19 U.S.C. §§ 411, 412, and 529 ("LMRDA"). Jurisdiction is predicated upon 28 U.S.C. §§ 1331, 1337, 1343(4) and 28 U.S.C. §§ 2201 and 2202. For the following reasons, the Court finds that its jurisdiction is preempted by the NLRB.



At all times material hereto, plaintiff Lynn L. Breininger has been a member of defendant Union. Defendant is signatory to a collective bargaining agreement with various contractor employers within defendant's jurisdiction. That jurisdiction is comprised of the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock, and Seneca in Ohio, and the counties of Monroe and Lenawee in Michigan. (Union Ex. C at 3). Pursuant to Article V of the collective bargaining agreement, it was agreed that the defendant Union would have the responsibility for referral of its members to job sites. In relevant part, Article V states that:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement . . .

(Union Ex. B 1 at 3-4).

Defendant Union does not maintain an exclusive hiring hall system. There are several options available to members through which one may secure employment. First, a member may have his name placed on the out-of-work list maintained by defendant at the Union hall. Second, a member may have his name placed on a separate list authorizing the defendant to refer him for work under the Specialty Agreement, a separate collective bargaining agreement negotiated to cover work on siding, decking, and metal buildings. Third, a member may solicit employment on his own, in addition to being signed up on the referral lists.

The out-of-work list maintained by defendant Union is signed by members who want to be referred to jobs by

the defendant. When an employer contacts the Union for workers,[1] and does not request workers by name, the Union begins at the top of the list and attempts to telephone each member in the order they appear on the list. This process continues until the requisite number of workers accept the job. (*See,* Union's June 13, 1984 deposition of plaintiff Breininger ["Union deposition"], at 30-32 and Affidavit of David Williams).

A separate list is signed by those members desiring to be referred to jobs pursuant to the Specialty Agreement. When the defendant receives a request for workers from an employer under the Specialty Agreement, the Union begins at the top of the list and attempts to telephone each member as they appear on the list and continues until the employer's request is filled. (*See,* Union deposition at 46 and Affidavit of David Williams).

An employer may request for referral specific employees by name. In these instances, the defendant Union attempts to contact and refer requested individuals to the job. If the defendant is unable to reach a requested worker or that worker refuses the referral, then the Union will refer individuals in order from the out-of-work list to satisfy the employer's request. (*See,* Union deposition at 66 an Affidavit of David Williams).

Members have the right to either accept or refuse a job referral. Refusal to accept a job does not affect a worker's place on the referral list. The individual maintains his position on the list and continues to receive refer-

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[1]A non-local contractor may only hire two (2) individuals without reference to defendant Union's out-of-work list. (See, Affidavit of David Williams.)



rals from the Union. Acceptance of a job will not remove a person's name from the referral list until that person has worked ten (10) consecutive working days.

In November of 1982, plaintiff was laid off from his employment. Since that time, plaintiff maintains that defendant Union has referred its members to job sites in a manner which discriminates against him. More specifically, plaintiff contends that other members were referred to jobs which had specifically requested plaintiff's presence. Further, plaintiff maintains that he was passed over for job referrals, even though he was very high on the seniority list. Additionally, plaintiff asserts that in failing to refer him for employment, defendant, acting through its business manager, David Williams, and business agent, Michael Duffy, has "otherwise disciplined" him in violation of 29 U.S.C. §§ 411(5) and 529.

Plaintiff has filed charges under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association with the defendant and the defendant's International concerning some of his allegations. No action, however, has been taken by defendant. Further, plaintiff states that he contacted the National Labor Relations Board ("NLRB") by telephone regarding these allegations. At that time, he was informed that his complaint was a contract dispute and that the NLRB did not handle such matters.

On December 13, 1983, plaintiff brought this suit alleging a cause of action based on a breach of the duty of fair representation under the LMRA, 29 U.S.C. §§151, 158(b), and 159. Plaintiff later amended his complaint on March 16, 1984, to include a violation of the LMRDA, 19

U.S.C. §§ 411, 412, and 529. Defendant Union has moved for summary judgment on the following grounds: (1) jurisdiction over plaintiff's complaint is preempted by the exclusive jurisdiction of the NLRB; (2) the duty of fair representation owed to all collective bargaining unit members by defendant Union has not been breached by defendant in this case; and (3) defendant Union has not violated 29 U.S.C. §411(5) or 529 with respect to plaintiff in making hiring hall referrals. In addition, or in the alternative, defendant Union has moved the Court to strike plaintiff's jury demand.

Initially, defendant argues that this Court's jurisdiction over plaintiff's complaint is preempted by the exclusive jurisdiction of the NLRB. Defendant contends that plaintiff's claims that defendant Union has discriminated against him constitute an unfair labor practice under 29 U.S.C. §§ 158(b)(1)(A) and (b)(2). In pertinent part, these sections state:

> (b) It shall be an unfair labor practice for a labor organization or its agents—
>
> (1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 157 of this title . . .
>
> (2) cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3) of this section . . .

The Court notes that Congress intended exclusive jurisdiction over discrimination in hiring hall referrals to lie with the NLRB. Congress has entrusted administration of our federal labor policy to the NLRB. In enacting the National Labor Relations Act ("NLRA") and later the Labor Management Relations Act,



> Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal. . . . Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as a different rules of substantive law.

*Garner v. Teamsters Union*, 346 U.S. 485, 490-91.

Thus, the NLRB has exclusive jurisdiction over matters which are arguably prohibited by § 7 of the LMRA, 29 U.S.C. § 157, or are arguably unfair labor practices prohibited by § 8 of the LMRA, 29 U.S.C. § 158. *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

The Supreme Court has noted that discrimination in hiring hall referrals constitutes an unfair labor practice under §§ 8(b)(1)(A) and 8(b)(2) of the NLRA. *Farmer v. United Bhd. of Carpenters, Local 25*, 430 U.S. 290, 303 n.11, 94 LRRM 2759 (1977); *N.L.R.B. v. International Union of Operating Eng'rs Local 18*, 205 N.L.R.B. 901, 84 LRRM 1349 (1973), *enforced*, 500 F.2d 48, 86 LRRM 2932 (6th Cir. 1974). The NLRB has exclusive jurisdiction over discrimination in hiring hall referrals. *Farmer*, 430 U.S. at 303; *Plumbers Local 100 v. Borden*, 373 U.S. 690, 53 LRRM 2322, *reh'g denied*, 375 U.S. 872 (1963); *Iron Workers Local 207 v. Perko*, 373 U.S. 701, 53 LRRM 2327, *reh'g denied*, 375 U.S. 872 (1963); *Whatmore v. Boilermakers*

*Local 85*, 120 LRRM 2273, No. C. 83-1154, slip op. at 8 (N.D. Ohio Oct. 19, 1984).

Although plaintiff states that the NLRB, characterizing his claim as a contract dispute, refused to hear it, the Court notes that plaintiff was told this through an informal telephone conversation with an NLRB employee. Plaintiff has neither filed a charge with the NLRB, nor received a formal review of his charges.

If this Court were to exercise jurisdiction over this cause of action, it would involve interferring with the NLRB's exclusive jurisdiction. Accordingly, the Court finds that it is without jurisdiction to hear plaintiff's claims. Thus, the remainder of defendant Union's motion for summary judgment and/or in the alternative to strike jury demand is now moot and accordingly is denied.

It is therefore,

ORDERED that defendant Union's motion for summary judgment is granted. This Court's jurisdiction is preempted by the NLRB.

FURTHER ORDERED that plaintiff's complaint is dismissed.

/s/ Nicholas J. Walinski
SENIOR U.S. DISTRICT JUDGE

Toledo, Ohio.
February 20, 1987

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## APPENDIX C

JUDGMENT IN A CIVIL CASE
UNITED STATES DISTRICT COURT

Case Title: Lynn L. Breninger, Plaintiff V. Sheet Metal Workers International Assoc. Defendants.

District: Northern District Of Ohio, Western Division.

Docket Number: C 83—1126.

Name of Judge: Nicholas J. Walinski.

[ ] Jury Verdict. This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

[x] Decision by Court. This action came to trial or hearing before the Court with the judge named above presiding. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

Defendant Union's Motion Summary Judgment is granted. Plaintiff's complaint is dismissed.

/s/ Nicholas J. Walinski
SENIOR U.S. DISTRICT JUDGE

CLERK JAMES S. GALLAS
(BY) DEPUTY CLERK DEAN E. WEAVER
DATE FEBRUARY 23, 1987

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## APPENDIX D

No. 87-3224

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| LYNN L. BREININGER,<br><br>Plaintiff-Appellant,<br>vs.<br><br>SHEET METAL WORKERS INTERNATIONAL ASSOCIATION, LOCAL UNION NO. 6,<br><br>Defendant-Appellee. | ) | ORDER |

(Filed April 22, 1988)

BEFORE: ENGEL, Chief Judge; KENNEDY and KRUPANSKY, Circuit Judges.

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition be, and it hereby is, DENIED.

ENTERED BY ORDER
OF THE COURT

John P. Hehman, Clerk
/s/ John P. Hehman

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## APPENDIX E

Text of Statutes Involved

28 USC § 1337

§ 1337. Commerce and antitrust regulations; amount in controversy, costs

(a) The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies: Provided, however, That the district courts shall have original jurisdiction of an action brought under section 11707 of title 49 [49 USC § 11707], only if the matter in controversy for each receipt or bill of lading exceeds $10,000, exclusive of interest and costs.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where a plaintiff who files the case under section 11707 of title 49 [49 USC § 11707], originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $10,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of any interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) The district courts shall not have jurisdiction under this section of any matter within the exclusive jurisdiction of the Court of International Trade under chapter 95 of this title [28 USC §§ 1581 et seq.].

---

29 USC § 411(a)(5)

(5) Safeguards against improper disciplinary action. No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.

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29 U.S.C. § 412. Civil action for infringement of rights; jurisdiction

Any person whose rights secured by the provisions of this title [29 USC §§ 411 et seq.] have been infringed by any violation of this title [29 USC §§ 411 et seq.] may bring a civil action in a district court of the United States for such relief (including injunctions) as may be appropriate. Any such action against a labor organization shall be brought in the district court of the United States for the district where the alleged violation occurred, or where the principal office of such labor organization is located.

---

29 U.S.C. § 158b(1)(A)

(b) Unfair labor practices by labor organization. It shall be an unfair labor practice for a labor organization or its agents—

(1) to restrain or coerce (A) employees in the exercise of the rights guaranteed in section 7 [29 USC § 157]: Provided, That this paragraph shall not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein;

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29 U.S.C. § 159. Representatives and elections

(a) Exclusive representatives—Employees' adjustment of grievances directly with employer. Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: Provided, That any individual employee or a group of employees shall have the right at any time to present grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: Provided further, That the bargaining representative has been given opportunity to be present at such adjustment.

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29 U.S.C. § 529. Prohibition on certain discipline by labor organization

It shall be unlawful for any labor organization, or any officer, agent, shop steward, or other representative of a labor organization, or any employee thereof to fine, suspend, expel, or otherwise discipline any of its members for exercising any right to which he is entitled under the provisions of this Act. The provisions of section 102 [29 USC § 412] shall be applicable in the enforcement of this section.

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## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

| | | |
|---|---|---|
| LYNN L. BREININGER<br>7310 Secor Road<br>Petersburg, Michigan 49270,<br><br>Plaintiff,<br><br>vs.<br><br>SHEET METAL WORKERS INTERNATIONAL ASSOCIATION<br>Local Union No. 6<br>4652 Lewis Avenue<br>Toledo, Ohio 43612,<br><br>Defendant. | ) | Civil Action<br>No. C83-1126<br><br>Judge<br>Nicholas J.<br>Walinski<br><br>FIRST<br>AMENDED<br>COMPLAINT<br>JURY DEMAND<br>ENDORSED<br>HEREON |

• • •

### JURISDICTION

1. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §§ 1331, 1137, 1343(4) and 28 U.S.C. §§ 2201 and 2202. This is a suit brought pursuant to 29 U.S.C. §§ 151, 158(b) and 159, based on allegations of the breach of duty of fair representation owed by the defendant union, Sheet Metal Workers International Association, Local Union No. 6, to plaintiff. Even though there is contained herein no alleged breach by an employer of a labor contract, federal jurisdiction is herein asserted in the within duty of fair representation case under 28 U.S.C. § 1337. See eg; *In re Carter*, 618 F.2d 1903 (5th Cir. 1980), *cert. denied*, 450 U.S. 949 (1981); *Retana vs. Apartment, Motel, Hotel,*



*and Electrical Operator's Union, Local 14, AFL-CIO*, 453 F.2d 1018 (9th Cir. 1982).

2. Jurisdiction of this Court is further invoked pursuant to 29 U.S.C. §§ 411, 412 and 529, known as the Landrum Griffin Act, which provides a right to a civil action for injunctive and other relief to any person whose rights have been infringed by any violation of said act.

### PARTIES

3. Plaintiff, Lynn L. Breininger, is a white male citizen of the United States and a resident of the City of Petersburg in the State of Michigan. Plaintiff is and has been a member in good standing of defendant, Sheet Metal Workers International Association, Local No. 6 for approximately thirty-four (34) years up to the present time and of the collective bargaining unit described in paragraph 3, *infra*.

4. Defendant, Sheet Metal Workers International Association, Local Union No. 6, is, and at all times material hereto, was the exclusive bargaining agent for all journeymen and apprentice sheet metal workers for the following multi-employer collective bargaining unit as described in the agreement entered into by and between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association for Toledo, Ohio and the counties of Lucas, Ottawa, Fulton, Williams, Defiance, Henry, Wood, Paulding, Putnam, Hancock and Seneca in Ohio and Monroe and Lenawee Counties in Michigan as follows:

### COLLECTIVE BARGAINING UNIT

*Section 1.* The persons, firms, corporations, joint ventures, or other business entities bound by the terms

of the Agreeemnt are referred to in this Agreement as "Employer" or "Employers." The Employers and the Union by entering in to this Agreement intend to and agree to establish a single multi-employer collective bargaining unit. Any Employer who becomes a party to this Agreement shall thereby become a member of the multi-employer collective bargaining unit established by this Agreement.

Said defendant is a labor organization representing employees in an industry affecting interstate commerce.

## COUNT ONE

### CAUSE OF ACTION BASED ON BREACH OF DUTY OF FAIR REPRESENTATION — 29 U.S.C. §§ 151, 158(b), and 159

5. Pursuant to Article V of the collective bargaining agreement between the Toledo Area Sheet Metal and Roofing Contractors Association and the Toledo Heating and Air Conditioning Contractors Association (the "Employer", collectively), and the defendant Sheet Metal Workers International Association, Local Union No. 6, it was agreed that the defendant union would have the responsibility for referral of its members to job sites. Article V of said agreement provides in pertinent part:

> The Union agrees to furnish upon request by the Employer duly qualified journeymen and apprentice sheet metal workers in sufficient numbers as may be necessary to properly execute work contracted for by the Employer in the manner and under the conditions specified in this Agreement . . .

6. Plaintiff Breininger states that from on or about November of 1982 up to the present time, the defendant union, acting by and through its business manager, David Williams, and/or its business agent, Michael Duffy, have



referred its members to job sites, purportedly pursuant to Article V of the collective bargaining agreement, in a manner by which plaintiff has discriminatorily treated in job referrals. Plaintiff states that at all times he has been and is a duly qualified journeyman sheet metal worker.

7. Plaintiff states that he was laid off in November of 1982. On April 6, 1983, Venderbush Industrial Corporation, a contractor from outside the jurisdiction of defendant, specifically requested plaintiff's presence at the Enrico Power Unit Job No. 2657 in Newport, Michigan on Monday, April 9, 1983 at 7:30 a. m. Although the job site was located within the jurisdiction of Local 6 and despite the employer's request, the defendant, acting by and through its business manager, David Williams, referred other members to the job. On May 9, 1983, Venderbush Industrial Corporation again requested plaintiff's presence on defendant the same aforementioned job site. Another member was again referred.

8. Plaintiff states that as of July 11, 1983, he was sixth on the seniority list maintained by defendant for its out of work members. On July 12, 1983, the Fred Christen & Sons Company requested three (3) specialty sheet metal workers. Again, on July 18, 1983, the Fred Christen & Sons Company requested an additional three (3) specialty sheet metal workers from defendant. Plaintiff learned that as of August 8, 1983, he was still fifth on the defendant's seniority list.

9. Plaintiff states that the ex-business manager of defendant, Don Reams, who was laid off on or about December 31, 1982, was set up with a job by Michael

Duffy, defendant's business agent, while plaintiff was passed over.

10. Plaintiff states that he continues to be passed over by defendant for job referrals and that this practice is continuing to his detriment.

11. Plaintiff states that he filed a charge under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Workers International Association with respect to the allegations contained in paragraph 6 of this Complaint, *supra*, on or about July 5, 1983 with the defendant and the defendant's International. To date, no action has been taken by defendant. A copy of said charge is hereto annexed and marked as Exhibit "A" and made a part hereof.

12. Plaintiff states that he filed a Charge Under Article 18, Section 1 of the Constitution and Ritual, Sheet Metal Worker's International Association with respect to the allegations contained in paragraphs 7 and 8 of this Complaint, *supra*, on or about September 16, 1983 with the defendant and the defendant's International. To date, no action has been taken by defendant. A copy of said charge is hereto annexed and marked as Exhibit "B" and made a part hereof.

13. Plaintiff states that in refusing to honor employer requests for plaintiff's employment, in refusing to properly administer the job seniority list, and in refusing to process and/or acknowledge his charges, the defendant union, in its representation of plaintiff, has acted arbitrarily, discriminatorily, and/or in bad faith and/or without reason or cause.



## COUNT TWO

### 29 U.S.C. §§ 411, 412, and 529

14. The allegations set forth in paragraphs one (1) through thirteen (13) of this complaint, *supra*, are herein incorporated by reference as if fully rewritten herein.

15. In June of 1982, the defendant local union held an election for the offices of business manager and business agent. In said election, plaintiff participated by handing out pencils advertising the former business manager, Don Reaume, and the former business agent, Bob Good. Plaintiff further states that it was generally known by the membership of defendant and by the present business manager, David Williams, and the present business agent, Michael Duffy, that he was opposed to them.

16. Plaintiff states that in failing to refer him for employment, as complained of *supra*, the defendant, acting by and through its present business manager, David Williams, and its present business agent, Michael Duffy, have "otherwise disciplined" plaintiff in violation of 29 U.S.C. § 411(5) and 29 U.S.C. § 529.

17. Plaintiff states that in making job referrals, the defendant has favored a faction of members of said union known as the "Concerned Brothers" who have been known to support and are known to support and who do support the present business manager, David Williams, and the present business agent, Michael Duffy. Plaintiff's discriminatory treatment in job referrals, as complained of *supra*, has been part of widespread, improper discipline for political opposition in violation of 29 U.S.C. 411(5) and 29 U.S.C. § 529.

18. In view of the facts as set forth, *supra*, plaintiff states that any further attempts at exhaustion would be futile.

19. Plaintiff states that as a result of the acts complained of in paragraphs one (1) through eighteen (18) of this complaint, *supra*, he has suffered great mental and emotional pain, stress, anxiety, humiliation, and embarrassment.

## PRAYER FOR RELIEF

WHEREFORE plaintiff respectfully prays:

20. That a summons issue to said union to appear herein and to answer the allegations contained in this complaint and to abide by and perform such orders and decrees that this Court may make.

21. That defendant be restored to his rightful place on the defendant's out of job seniority list and to his rightful job or in the alternative for front pay until an appropriate opening becomes available, and that defendant be enjoined from any further interference with the proper administration of the job referrals.

22. That an order issue from this Court requiring said defendant to pay to plaintiff his lost wages and benefits, which have resulted from the conduct of the defendant as complained of herein.

23. That plaintiff be granted judgment in the sum of $150,000.00 compensatory damages for emotional and physical harm caused by defendant's conduct.

24. That the Court grant plaintiff all additional relief to which he may appear to be entitled.



25. That the Court grant plaintiff his costs herein including reasonable attorney fees.

Respectfully submitted,

WASSERMAN, WASSERMAN, BRYAN & LANDRY

By: /s/ FRANCIS J. LANDRY
Francis J. Landry
300 Inns of Court Building
405 N. Huron Street
Toledo, Ohio 43604
Telephone: 419-243-1239
Attorney for Plaintiff,
Lynn L. Breininger

## JURY DEMAND

Plaintiff demands a trial by jury on all issues so triable in the within cause of action.

/s/ FRANCIS J. LANDRY
Francis J. Landry, Attorney for
Plaintiff, Lynn L. Breininger

## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing First Amended Complaint Jury Demand Endorsed Hereon was sent by ordinary U.S. mail service to Jeffrey Julius, Esquire, Gallon, Kalniz & Iorio Co., L.P.A., 3161 North Republic Road, Toledo, Ohio 43615 Attorney for Defendant Sheet Metal Workers International Association, Local Union No. 6, on this 16th day of March, 1984.

/s/ FRANCIS J. LANDRY
Francis J. Landry